APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of November, one thousand nine hundred and seventy-three.

Present:

HON. STERRY R. WATERMAN
HON. HENRY J. FRIENDLY
HON. WILLIAM H. TIMBERS
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

ALBERT MASCOLO and LOUIS EPIFANIA,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of

New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is Affirmed. Although the prosecution may not have been as candid as would have been desirable, we are unable to see what prejudice this caused the defendants. The contention that although the Government had probable cause to arrest, it was required to seek a warrant for a street arrest if it had time to do so is without legal basis. The mandate shall issue forthwith.

s/ Sterry R. Waterman
STERRY R. WATERMAN

s/ Henry J. Friendly
HENRY J. FRIENDLY

s/ William H. Timbers
WILLIAM H. TIMBERS

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NITED STATES OF AMERICA,

-against-

LBERT MASCOLO and LOUIS EPIFANIA,

Defendants.

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ppearances:

HON. ROBERT A. MORSE
United States Attorney
Eastern District of New York
Attorney for United States of America
DENIS E. DILLON, ESQ.
Attorney in Charge
Organized Crime Section
ROBERT G. DEL GROSSO, ESQ.
Special Attorney
Of Counsel

AARON NUSSBAUM, ESQ.
Attorney for defendant Albert Mascolo

ARNOLD D. ROSEMAN, ESQ.
Attorney for defendant Louis Epifania

BARTELS, D.J.

This is an application by the defendants in the above-entitled matter for an order, pursuant to Rules 12, 16(g) and 48 of the Federal Rules of Criminal Procedure, 18 U.S.C., to vacate a jury verdict of conviction rendered against them on February 20, 1973, after a trial before this Court. In support thereof, a number of grounds are alleged including the violation of defendants' constitutional rights under the Fourth, Fifth and Sixth Amendments. To justify the application defendants assert a number of arguments which are in reality issues that should be raised before the Court of Appeals and cannot properly be considered upon an application of this character, for which there is no authority under the above-mentioned rules with the possible exception of the claim under Rule 16(g), for failure to make a proper disclosure of a co-conspirator's name.

In a verbose, repetitious and expansive application of this type containing many irrelevancies, it is not easy to determine the real gravamen of the complaint. Stripped of all of its exaggerated claims and verbosity, however, the essence of the charge, as far as this Court can ascertain, seems to be predicated upon alleged prosecutorial misconduct in knowingly suppressing from the defendants and this Court evidence vital to the defense at the time of the suppression hearing. There is no claim of any newly discovered evidence or any reason why the charges now made are not and should not be properly raised upon appeal. Nevertheless, the Court felt that expediency might be served if a hearing were held to permit the defendants to amplify or clarify their charges. Such a hearing was therefore held on July 31, 1973, at which time argument was heard and testimony was taken from Assistant United States Attorney Del Grosso,* which was sufficient to justify this Court in concluding that the claims of the defendants are frivolous.

*Contrary to the Court's incorrect statement, no testimony was taken whatsoever, and there was no formal "hearing" (see *infra* pp. 28-30).

Specifically, the defendants charge the Government with wilfully suppressing the fact that John McMillan, an unnamed co-conspirator in the indictment, was the key informant responsible for the arrest of both Mascolo and Epifania and one Dennis Wieder. They assert that the Government knew that John McMillan was a co-conspirator back in September of 1971[1]; that it did not inform them of John McMillan's involvement until February 1, 1973,[2] six days before the commencement of the suppression hearing and the trial, and that had they known at the suppression hearing that the Government was aware of McMillan's participation as far back as September 28, 1972,[3] they could have successfully convinced the Court that Wieder's arrest on September 28, 1971,[4] and Mascolo's arrest on October 25, 1972,[5] were without warrants in violation of the Fourth Amendment and consequently were invalid. From these conclusions defendants also claim that it would follow that the package of heroin picked up by the Government at the time of Wieder's arrest and the seizure of heroin from Wieder's car at the time of Mascolo's arrest would have been suppressed. Assistant United States Attorney Del Grosso testified that the Government first became aware of McMillan's role as a co-conspirator in the instant case on the 30th day of January, 1973, and that immediately thereafter the Government informed both defense attorneys and the Court of that fact. He further stated

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* All footnotes ours.

1. The Court's memorandum decision is replete with factual error pertaining to the critical dates depicted in the record. The correct date should be June 2, 1972, the date of McMillan's arrest.

2. The correct date should be February 1, 1972.

3. The correct date should be June 2, 1972.

4. 1972.

5. 1972

that neither he nor the Government agents knew that McMillan had been a co-conspirator in this case the previous June, as the defendants alleged. This Court accepted this testimony and noted that defendants made no showing indicating that the Government had intentionally misled either them or the Court. Even had the Court found that the Government had withheld this information, such finding would not have in any way changed the rulings rendered at the suppression hearing or indeed at the trial itself.

In the first place, neither of these defendants has any standing to raise any Fourth Amendment claim arising out of Wieder's arrest. See *Alderman v. United States,* 394 U.S. 165, 171-172 (1969), and *Jones v. United States,* 362 U.S. 257, 261 (1960). In the second place, the issue of Wieder's warrantless arrest had already been adjudicated at the suppression hearing held in February, 1973. At that time, although the Court permitted the defendants to raise the question, it ruled that the arrest of Wieder and the seizure of the bag of heroin which he had thrown out of his car were lawful upon the grounds that Wieder had abandoned the bag of heroin prior to his arrest, and that even if he had not, the seizure was incident to a lawful arrest based upon probable cause. Nothing that McMillan said or did not say alters this judgment in our opinion.

With respect to Mascolo's arrest, the Court ruled at the suppression hearing that although Mascolo's arrest on October 25, 1971[6] was without a warrant, it was nevertheless lawful because probable cause for the arrest did not emerge until the happening of the events on that day. According to the evidence, the informant, Wieder, told the Federal agents on October 25th

6. The correct date should be October 25, 1972.

that he had an appointment to meet Epifania at 2 P.M. to consummate a drug transaction with him at a certain street corner in Brooklyn. The agents induced Wieder to postpone the appointment until 4 P.M., whereupon, pursuant to a pre-arranged plan, the agents followed Wieder in his car as he picked up Mascolo (to whom Epifania had obviously given the message) on a street corner and made the arrest of Mascolo only after Wieder had indicated by his failure to use his automobile signal device, that he had picked up Mascolo and that the sale of drugs had been consummated in his car. Incidental to this legal arrest, the seizure of heroin from underneath the car seat on which Mascolo was sitting, was ruled lawful. The reliability of Wieder as informant had not yet been established and therefore until Mascolo approached and entered Dennis Wieder's car, there was insufficient probable cause for a warrant for Mascolo's arrest. Nor does the Court understand how any prior information relayed to the defendants that McMillan was a co-conspirator could have altered this conclusion. In any event, McMillan's name was disclosed prior to the suppression hearing. Probable cause for Mascolo's arrest appeared from the actual occurrence on the scene on October 25th as evolved from previous information provided by Wieder and not from anything McMillan might have testified to. To say that the agents should have obtained a warrant before the arrest of either Wieder or Mascolo was to completely ignore the realities of the situation. *Cf. United States v. Gonzalez,* —— F.2d —— (2d Cir. August 9, 1973) (Slip Op. 4951, 4954).

Among the arguments advanced by the defendants, the effort to analogize the dismissal of Daniel Ellsberg's indictment to the circumstances of this case is particularly incomprehensible.

Defendants' application is hereby denied in all respects. SO ORDERED.

Dated: Brooklyn, N.Y.,
August 14, 1973.

s/ John R. Bartels
United States District Judge